

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN FREDRICK MUELLER,

Defendant-Appellant.

UNPUBLISHED

April 15, 2014

No. 313190

Saginaw Circuit Court

LC No. 11-036130-FC

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant pleaded no contest to one count of assault with intent to commit great bodily harm less than murder, MCL 750.84. He was initially sentenced to 72 months to 120 months, but this Court ordered resentencing in lieu of granting leave to appeal “for the reason that the trial court failed to articulate substantial and compelling reasons for departing from the guidelines.”¹ Upon resentencing, the court again sentenced defendant to 72 months to 120 months, with 63 days’ jail credit. Defendant now appeals by leave granted.² We affirm.

Defendant’s plea arose from an attack on his then girlfriend. He entered her home and began screaming at her. She asked him to leave and fell back asleep. However, defendant did not leave and the victim next awoke to find him strangling her. She screamed and fought him off the bed onto the floor. There defendant strangled her from behind, pulled her head back to the point she thought it would snap, pulled her right arm so hard she thought it would break, and beat her head against the floor and side of the bed. Defendant repeatedly threatened to kill her. She lost consciousness twice. When she regained consciousness, defendant was attempting to strangle her yet again with a piece of fabric. She played dead, whereupon defendant went downstairs, and she was able to escape onto the roof and call the police. The hospital found she had a skull fracture, severe swelling, and severe injuries to her throat.

¹ *People v Mueller*, unpublished order of the Court of Appeals, entered June 22, 2012 (Docket No. 308419).

² *People v Mueller*, unpublished order of the Court of Appeals, entered October 17, 2013 (Docket No. 313190).

Defendant's guideline minimum range was 19 to 38 months. MCL 777.65. The court again sentenced defendant to 72 months to 120 months, with 63 days credit.

Defendant argues that the court abused its discretion in departing from the sentencing guidelines.

On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [*People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).]

The sentencing guidelines are controlled by statute and “a departure is only allowed by the Legislature if there is a ‘substantial and compelling reason’ for doing so.” *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003), quoting MCL 769.34(3). A substantial and compelling reason means “an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases.” *Id.* at 258 (quotation marks and citation omitted). Objective and verifiable facts justifying a departure must be “external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A trial court may not depart based on actions “already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight.” *Id.*, citing MCL 769.34.

The trial court is required to “justify the *particular* departure” in each case where it departs. *Smith*, 482 Mich at 304, quoting *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001) (emphasis in original). This Court must “engage in a proportionality review,” which considers “whether the sentence is proportionate to the seriousness of the defendant’s conduct” and defendant’s criminal record. *Id.* at 304-305. Proportionality exists when the “minimum sentence that exceeds the guidelines recommendation [is] more appropriate to the offense and the offender than a sentence within the guidelines range would have been.” *Id.* at 318. Proportionality may be justified by “comparing it against the sentencing grid and anchoring it in the sentencing guidelines.” *Id.*

Here, the trial court articulated objective and verifiable reasons for its departure. Although defendant argues that the court’s characterization of the facts as “horrendous” is a subjective reaction of the trial court judge, the court’s characterization was grounded in the facts of the assault. The court noted that defendant repeatedly strangled the victim, the severity of the injuries to the victim’s neck, and her treating doctor’s testimony that the victim suffered a “near

death experience.”³ The doctor founded this conclusion on Davis’s lactic and lactate acid levels, as well as her significant facial bruising. He was able to visually determine that she had been choked for a sustained period of time.

The court also indicated a score of 10 points for OV 3, which covers “physical injury to a victim,” did not adequately account for the serious injuries suffered by Davis. MCL 777.33. “Bodily injury requiring medical treatment” is scored at 10 points, while a “[l]ife threatening or permanent incapacitating injury” is scored at 25 points. MCL 777.33(c) and (d). Scores above 25 points are reserved for when there is a death. MCL 777.33(a) and (b). At resentencing, the court specified it believed OV 3 could have been scored at 25 points, which is consistent with the medical testimony that Davis’s injuries evidenced a “near death experience.” See *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

A court may utilize conduct already accounted in the OV scoring to justify departure if the court finds “the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). The court explicitly stated its belief that the “sentencing guidelines do not adequately reflect the weight that should be given to that variable nor the sentence overall” to justify its continued departure. Here the total OV score of 141 is nearly double the 75 point maximum under the applicable sentencing guideline grid. See MCL 777.65.

In discussing the requirements to justify a particular departure, our Supreme Court has provided a summary of seven items, three of which are particularly applicable here. *Smith*, 482 Mich at 317-319. Given in their original numbering scheme, those summaries are:

(4) The minimum sentence imposed must be proportionate. That is, the sentence must adequately account for the gravity of the offense and any relevant characteristics of the offender. To be proportionate, a minimum sentence that exceeds the guidelines recommendation must be more appropriate to the offense and the offender than a sentence within the guidelines range would have been.

(5) When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.

(6) It is appropriate to justify the proportionality of a departure by comparing it against the sentencing grid and anchoring it in the sentencing guidelines. The trial court should explain why the substantial and compelling reasons supporting the departure are similar to conduct that would produce a

³ The doctor testified that the victim had elevated lactic and lactate acid “both of which are consistent with hypoxemia or lack of oxygen for a sustained period of time,” which in his “experience of 30 years [was] a significant finding.” Although he sees traumatic injuries often, he believed it was significant “[c]ompared to seeing it in the autopsy room. . . . It was a near death experience for her.”

guidelines-range sentence of the same length as the departure sentence. [*Id.* at 318.]

Additionally, the Court noted that such departures are not subject to “mathematical precision,” and therefore, a “trial court must comply *reasonably*” in applying the standards. *Id.* at 319 (emphasis in original).

Although the court did not specifically state that it found the sentence imposed to be more proportional to the circumstances of this crime and this defendant than the range recommended by the sentencing guidelines, it can be clearly inferred from what the court did say. Again, the court noted (1) that defendant repeatedly strangled the victim, (2) the severity of the violence, (3) the medical testimony that Davis suffered a “near death experience,” and (4) advised defendant that he was “lucky that this victim didn’t die from your actions.” The court also considered how far the OV score was above the base of the top OV point total for the sentencing grid. See MCL 777.65. The court did not abuse its discretion as the upward departure was proportionate to this defendant and his conduct.

Affirmed.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan